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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 415

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DeGRACIA, ET AL.

Appellants,

vs.

J. M. WITSELL, EDWARD M. BURROUGHS, E. L. SWEAT, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

STATEMENT AS TO JURISDICTION

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DeGRACIA, S. W. DAVIES, S. D. COLLINS, AND THE ATLANTIC SEAFOOD PRODUCERS, INC., A CORPORATION, PLAINTIFFS,

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, C. L. YOUNG AND J. A. WILCOX, COMPOSING THE SOUTH CAROLINA STATE BOARD OF FISHERIES, A BODY CORPORATE AND ALONZO B. SEABROOK, THE CHIEF INSPECTOR THEREOF, *Defendants.*

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT OR DECREE IN QUESTION.

The plaintiffs-appellants, having presented this day their petition for appeal, now file this their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order, judgment or decree in question, and should exercise such jurisdiction in this case.

(A) The Statutory Provision Believed to Sustain the Jurisdiction

This appeal is prosecuted from the final order, judgment or decree which dismisses the suit by plaintiffs-appellants

and denies the application for an interlocutory injunction therein to restrain individuals composing the South Carolina State Board of Fisheries from enforcing against plaintiffs-appellants certain South Carolina Statutes which provide that the coastal waters beyond the low water mark within the three mile maritime belt shall be a common for the people of the State of South Carolina for the taking of fish and imposing an annual license fee of Twenty-five ($25.00) Dollars on boats engaged in shrimp fishing therein if owned by residents of South Carolina and a license fee of Twenty-five hundred ($2,500.00) Dollars if owned by non-residents and further limiting the issuance of non-resident licenses to one hundred (100) and imposing tax of one-eighth (⅛) cent per pound on green shrimp taken or shipped from said state and requiring all boats licensed to trawl for shrimp in the coastal waters within three miles of the ordinary low water mark on the coast of said State to unload their catch of shrimp and pack and properly stamp the same within the State of South Carolina before shipping or transporting it to another state or the waters thereof and imposing punishment for the violation thereof.

The final order, judgment or decree here appealed from was entered in the District Court of the United States for the Eastern District of South Carolina, Charleston Division, on September 13th, 1947, by a statutory court consisting of one Circuit and two District judges specially convoked under and by virtue of the provisions of Section 266 of the Judicial Code (28 U.S.C.A., sec. 380). The said statute concludes as follows:

"... and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

It is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final

order, judgment or decree in question by virtue of the express provisions last above set forth.

Paramount Pictures v. *Langer*, 306 U. S. 619, 83 L. Ed. 1025, 59 Sup. Ct., 641.

(B) The State Statutes and Administrative Orders Which Are Involved

The plaintiffs complaint contends that certain statutes of the State of South Carolina are void and unconstitutional as applied to them upon the following grounds:

1. That the State of South Carolina has no jurisdiction of the coastal waters or ocean within the three-mile maritime belt lying seaward of the ordinary low water mark on the coast thereof.

2. That the said Statutes as applied to plaintiffs make an arbitrary and unreasonable discrimination between residents and non-residents of the State of South Carolina in violation of the Privileges and Immunities clause (Art. IV sec. 2 (1) of the Constitution, and the Commerce clause, the Due Process and Equal Protection clauses of the Fourteenth Amendment; and,

3. That the Statutes impose a tax on imports and a burden on interstate commerce in violation of Sections 8 and 10 of Art. 1.

4. That said Statutes are not bona fide conservation measures, and were passed and operate to illegally deny citizens of other states rights granted to residents of South Carolina, and designed to perpetuate and create a monopoly to the citizens of South Carolina in the shrimp industry.

The Statutes of the State of South Carolina above referred to provide in substance as follows:

Section 3300 of the Code of South Carolina provides that all waters in the maritime belt within three miles seaward of the low water mark of the coast of the State of South Carolina shall be a "common for the people of the State for taking of fish" and requiring that licenses be secured from the State of South Carolina for that purpose.

Section 3379 of the Code of South Carolina requires all fishing boats owned by residents of South Carolina to obtain an annual license for the sum of Twenty-five ($25.00) Dollars and all fishing boats owned by non-residents of said state to secure an annual license for the sum of Twenty-five hundred ($2,500.00) Dollars, provided that licenses required of non-residents who have operated their boats in South Carolina during each of three preceding years may be secured by said non-residents for One hundred fifty ($150.00) Dollars and further limiting the number of non-residents fishing licenses to one hundred.

Section 3374 of the Code of South Carolina imposes a tax of one-eighth (⅛) cent per pound on all green shrimp taken in the ocean waters within the three mile maritime belt of said State as hereinbefore set forth.

Section 3414 of the Code of South Carolina requires all boats licensed to trawl for shrimp in the maritime belt or ocean waters within three miles of the low water mark of the coast thereof to bring their catch of shrimp and fish into the ports of South Carolina where they shall be unloaded, packed and properly stamped before shipping or transporting to another State or the waters thereof.

Section 3407 of the Code of South Carolina provides Penalties of One thousand ($1,000.00) Dollars fine and im-

prisonment of not more than six months for violation of the foregoing statutes.

(C) The Date of the Judgment or Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Is Presented.

The final order, judgment or decree here sought to be reviewed was entered and appeared of record on September 13, 1947. The petition for appeal herein was presented and filed on October 3rd, A. D. 1947.

(D) Statement Showing That the Nature of the Case and of the Ruling of the Court Was Such as to Bring the Case Within the Jurisdictional Provision Relied Upon.

The complaint attacked the validity and constitutionality not only of the foregoing Statutes but also the jurisdiction of the State of South Carolina over the ocean waters within the three miles maritime belt from the low water mark on the coast of the State of South Carolina.

On August 18th, 1947, a hearing on the temporary restraining order was held before a District Judge who set the hearing on the prayer for an interlocutory injunction for a date certain and called one Circuit Judge and one District Judge to his assistance as required by Section 266 of the Judicial Code (28 U. S. C. A. Sec. 380).

On August 25th, 1947, a final hearing was held on the application for interlocutory injunction and thereafter on September 13th, 1947, the same three judges entered a final judgment, and decree dismissing plaintiffs' complaint and denying the application for interlocutory injunction.

The case was heard and determined and the final judgment and decree was predicated upon the issues raised by

the plaintiffs' complaint and the defendants' return and answer and were in substance as follows:

(1) Whether a Federal Court of Equity had jurisdiction to entertain the application for injunction,

(2) Whether the plaintiffs were entitled to relief in equity because of having violated an equitable maxim of not coming into court with clean hands,

(3) Whether the statutes attacked were unconstitutional and,

(4) Whether the plaintiffs were entitled to the relief which they sought or whether the proceedings should be remanded to a State Court.

The Court in its decree held that the plaintiffs had a right to come into a Federal Court of Equity, that they had not violated any equitable maxim, and that the case did not have to be remanded back to the State Courts; however, on the general broad basic proposition the Court held that the statutes were not unconstitutional and the plaintiffs, because of said fact, were not entitled to the relief sought.

The sole issue, therefore, for determination by this Court is the constitutionality of the Statutes of the State of South Carolina as enumerated in the pleadings.

(E) The Issues Involved Are of National Importance

In that they affect the rights of fishing interests in many of the coastal states, and it is necessary that the rights of the various states be established in order to clarify a situation which is confusing and likely to cause recrimination by states against states and lead to a series of repressive measures by various states against the alleged offending states.

(F) The Amount Involved Is Substantial

In that the property losses in the present case according to the record amount to more than $100,000.00 a year as applied only to petitioners, a mere segment of the fishing interests of one state.

(G) Substantial Federal Questions Are Raised

For the first time on the question of a State to attempt to pass tax measures under the guise of conservation measures for the purpose of barring non-residents from fishing in the ocean off the shores of a state, there being no decision of the Supreme Court on this precise question, although there have been one or more conflicting Circuit Court of Appeal decisions.

Proposition and Authorities

The following decisions of this Court are believed to sustain the jurisdiction of the Supreme Court of the United States on a direct appeal to review the final order, judgment or decree herein questioned:

Ex Parte Young, 209 U. S. 123, 155, 162;
Kennington v. *Palmer*, 255 U. S. 100;
Terrence v. *Thompson*, 253 U. S. 194, 214;
Packard v. *Barton*, 264 U. S. 140-143.

Statement Respecting Opinions

The Court below delivered a written opinion, a large part of which is devoted to the discussion of the jurisdiction of the Court over the subject matter and whether or not injunctive relief was appropriate in the instant case. In this connection the Court said:

> "It is clear, however, that there is diversity of citizenship and that the cause of action asserted by the plaintiffs arises under the Constitution of the United

States. Plaintiffs cannot bring themselves within a $150.00 license provision and as to one or more of them, the license fees which they are required to pay under the act will amount to $5,000.00 or more. If they should not pay the license the criminal penalties which would incur by unlicensed trawling would make it impossible for them to continue trawling in South Carolina waters and this would involve loss of business for a number of the plaintiffs in excess of $3,000.00 annually. There is no provision for payment of the license tax under protest and suit for its recovery; and it is clear that if plaintiffs' contention as to the invalidity of the statutes is correct, they are threatened with irreparable injury and have no adequate remedy at law of which they may avail themselves".

In addition to rendering a written opinion in the above listed case the Court below made certain findings of fact and conclusions of law in connection with the entry of the decree in question. Copies of these findings and conclusions of law and of the final decree herein are reproduced as Appendices A, B and C and attached to this jurisdictional statement.

Respectfully submitted,

JOHN J. BOUHAN,
AARON KRAVITCH,
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PHYLLIS KRAVITCH,
Attorneys for Appellants.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DEGRACIA, S. W. DAVIES, S. D. COLLINS, and THE ATLANTIC SEAFOOD PRODUCERS, INC., a Corporation, *Plaintiffs*,

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, C. L. YOUNG and J. A. WILCOX, Composing the South Carolina State Board of Fisheries, a Body Corporate and ALONZO B. SEABROOK, the Chief Inspector Thereof, Defendants

ON SUBMISSION FOR FINAL DECREE

(Argued August 25, 1947. Decided —— —, —)

Before Parker, Circuit Judge, and Wyche and Timmerman, District Judges

Robert E. Falligant, Thomas P. Bussey, Phyllis Kravitch and Aaron Kravitch, Attorneys for Petitioners; John M. Daniel, Attorney General for South Carolina, T. S. Callison and J. Monroe Fulmer, Assistant Attorneys General, and Robinson & Robinson, Attorneys for Defendants.

PARKER, *Circuit Judge*:

This is a suit by certain citizens of Georgia and a Florida corporation, engaged in fishing for shrimp in the coastal waters off the shores of the States of North Carolina, South Carolina, Georgia and Florida, against the individuals composing the South Carolina State Board of Fisheries, to enjoin the latter from enforcing against plaintiffs the provisions of the South Carolina statutes with respect to fishing for shrimp in South Carolina waters. Plaintiffs do not fish within the inland waters of South Carolina but within and beyond the three-mile maritime belt of the coastal waters. They contend that the statutes are void as applied to them

on the following grounds: (1) that the State of South Carolina has no jurisdiction of the coastal waters beyond low water mark; (2) that the statutes make arbitrary discrimination between residents and non-residents of South Carolina in violation of the Privileges and Immunities clause (Art. IV, sec. 2 (1) of the Constitution and the Equal Protection clause of the Fourteenth Amendment; and (3) that the statutes impose a tax on imports and a burden on interstate commerce in violation of sections 8 and 10 of Art. I. Interlocutory injunction has been asked; a court of three judges has convened pursuant to sec. 266 of the Judicial Code; and the case has been heard upon the merits and submitted for final decree.

The facts are that each of plaintiffs is operating boats engaged in fishing for shrimp off the shores of the states above named. The shrimp spend the Winter and multiply in the inland waters of the states and in the Spring and Summer months move out into the coastal waters, where they migrate southward in the Fall and Winter and northward in Spring and Summer. Fishing for them in the inland waters of South Carolina is absolutely forbidden and regulation of the fishing within the three-miles maritime belt is attempted by the statutes of which complaint is made. Sec. 3300 of the Code provides that these waters, as well as the inland waters, shall be "a common for the people of the state for the taking of fish". Sec. 3379 of the Code imposes an annual license fee of $25.00 on boats engaged in shrimp fishing, if owned by residents of South Carolina, and of $2500.00, if owned by non-residents, with provision that the license required of non-residents be only $150.00 if they have operated boats in South Carolina during each of the preceding three years, but that not more than one hundred licenses be issued to non-residents. Sec. 3374 imposes a tax of one-eighth cent per pound on green shrimp taken or "canned, shucked or shipped for market"; and sec. 3414 requires all boats licensed to trawl for shrimp in the waters of the state to "unload their catch of shrimp, and pack and properly stamp the same before shipping or transporting it to another state or the waters thereof". Violation of this provision is punishable by a fine of $500.00 or one year's imprisonment or both. Sec. 3407 provides pun-

ishment of $1,000.00 fine or six months imprisonment for other violations of the article regulating fisheries for which specific punishment is not otherwise provided.

Preliminary questions have been raised as to the jurisdiction of the court and as to whether injunctive relief is appropriate. It is clear, however, that there is diversity of citizenship and that the cause of action asserted by plaintiffs arises under the Constitution of the United States. Plaintiffs cannot bring themselves within the $150.00 license provision, and as to one or more of them the license fees which they will be required to pay under the act will amount to $5,000.00 or more. If they should not pay the license, the criminal penalties which they would incur by unlicensed trawling would make it impossible for them to continue trawling in South Carolina waters, and this would involve loss of business for a number of the plaintiffs in excess of $3,000.00 annually. There is no provision for payment of the license tax under protest and suit for its recovery; and it is clear that, if plaintiffs' contention as to the invalidity of the statutes is correct, they are threatened with irreparable injury and have no adequate remedy at law of which they may avail themselves. Ex Parte Young 209 U. S. 123, 155, 162; Kennington *v.* Palmer, 255 U. S. 100; Terrace *v.* Thompson 253 U. S. 197, 214; Packard *v.* Banton 264 U. S. 140, 143. The statutes involved are clear and there is no such need for interpretation or other special circumstances as would warrant the Court in staying action pending proceedings in courts of the state, as was held proper in American Federation of Labor *v.* Watson, 327 U. S. 582, 595, 599.

Defendants point to the fact that certain of plaintiffs have been found guilty of criminal violation of the statutes and say that in proper application of the clean hands doctrine they should not be heard by a court of equity. It is well settled, however, that courts of equity "do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication. Story, id., sec. 100. Pomeroy, id., sec. 399. They apply the maxim, not by way of punishment for

extraneous transgressions, but upon considerations that make for the advancement of right and justice. They are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion". Keystone Driller Co. *v.* General Excavation Co., 290 U. S. 240, 245-246; George N. Mas *v.* The Coca Cola Co., 4 Cir. — F. 2d —. The matter involved in suit here is the constitutionality of the statutes complained of by plaintiffs, and neither this question nor the equitable relationship of the parties could possibly be affected by plaintiffs' disobedience of the statutes; and, at all events, the matter is one resting in our discretion, and we should not exercise that discretion to refuse a hearing to one who complains that state legislation affecting others as well as himself is violative of rights guaranteed by the Constitution of the United States.

We come then to the principal question in the case, which is whether the statutes are void on the ground that the state has no such jurisdiction over the coastal waters within the three-mile maritime belt as would support such legislation. The question is raised because of the recent decision of the Supreme Court in United States *v.* California, 67 S. Ct. 1658; but, for reasons hereinafter set forth, we do not regard that decision as controlling, in the absence of any assertion of rights by the federal government. The power of the states over such waters and the fishing rights in them is well settled by a long line of decisions, and we do not understand that it was intended by the decision in the California case to overrule these or to question in any respect the law as declared by them. On the contrary the Court was at great pains in the California case to distinguish the cases which dealt with the power of the states over fishing in coastal waters.

The right of the state to control the fish running in tide waters was laid down in an opinion by Chief Justice Waite in McCready *v.* Virginia, 94 U. S. 391, 394, as follows:

> "The principal has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. Pollard's Lessee *v.* Hagan, 3 How. 212; Smith *v.* Maryland, 18 How. 74; Mumford *v.* Wardell, 6 Wall. 436;

Weber *v.* Harbor Commissioners, 18 id. 66. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. Martin *v.* Waddell, 16 Pet. 410. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property rights, and not a mere privilege, or immunity of citizenship."

That this right over fisheries applies within the three mile maritime belt and not merely to inland waters was laid down unequivocally in Manchester *v.* Commonwealth of Massachusetts, 139 U. S. 240, where, however, the precise question related to the control of fishing in Buzzard's Bay. The Court said:

"Therefore, if Massachusetts had continued to be an independent nation, her boundaries on the sea, as defined by her statutes, could unquestionably be acknowledged by all foreign nations, and her rights to control the fisheries within those boundaries would be conceded. The limits of the right of a nation to control the fisheries on its seacoasts, and in the bays and arms of the sea within its territory, have never been placed at less than a marine league from the coast on the open sea; and bays wholly within the territory of a nation, the headlands of which are not more than two

> marine leagues, or six geographical miles, apart, have always been regarded as a part of the territory in which they lie. * * * We do not consider the question whether or not Congress would have the right to control the menhaden fisheries which the statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the State in the absence of affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the State."

In Louisiana *v.* Mississippi, 202 U. S. 1, 52, relating to a complicated boundary dispute between the states named, Chief Justice Fuller stated the rule as follows, citing McCready *v.* Virginia and Manchester *v.* Massachusetts, viz.:

> "The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian states, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea."

Directly in point is the Abby Dodge, 223 U. S. 166. That case involved a federal statute prohibiting a certain type of sponge fishing in the Gulf of Mexico or straits of Florida. The court construed the statute as not having relation to waters within the maritime belt on the ground that fishing there was subject to the control of the state. Directly in point, also, is the case of Skiriotes *v.* Florida, 313 U. S. 69, which dealt with a statute of Florida which forbade the use of diving equipment for the purpose of taking commercial sponges within the maritime belt as defined by Florida law. Holding that the statute was a valid exercise of state power and that there was no conflict with a federal statute limiting the size of sponges which might be taken outside state territorial limits, the court said:

> "According to familiar principles, Congress having occupied but a limited field, the authority of the State to protect its interests by additional or supplementary

legislation otherwise valid is not impaired.—* * * It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the statute *so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation is within the police power of the state.*" (Italics supplied.)

It is worthy of note that, in the case of United States *v.* California, supra, the Supreme Court quoted from the case of Skiriotes *v.* Florida, italicizing the language which we have italicized in the above quotation. All four of the cases which we have cited were cited by the Supreme Court and distinguished in the California case; and there was no suggestion that they were being overruled. The California case held that the state was not the owner of the land under the ocean within the maritime belt, and that it could not claim the oil to be derived therefrom against the claim of the United States; but the established doctrine that the state might exercise police power over the maritime belt and control fishing therein was not questioned in the opinion or affected in any way by the decision. It is clear that very different considerations should govern the decision as to who is to exercise police power over the marginal seas, which can easily be used to interfere with law enforcement on land, or as to who is to control fishing in areas which mean so much to the support of large numbers of people who live near the sea, from those which should govern as to who is to control in the maritime belt the oil to be secured from the land under the ocean, a matter which could easily lead to international controversy. The United States has asserted its paramount authority with respect to oil, but no such authority with respect to fish or fishing; and we see no reason why we should not follow the well settled line of decisions which hold that, in the absence of action by the federal government, the power as to these rests in the several states. If these decisions are to be overruled, the matter is one for the Supreme Court and not for us.

Plaintiffs contend that until the enactment of the fisheries law of 1924 no authority was asserted by the State of South Carolina over the maritime belt and that it was not within

the boundaries of the state as set forth in the statute defining them. Code sec. 2038. An examination of the statute, however, shows that the boundary on the east is given as the Atlantic Ocean; and there is nothing in this inconsistent with the intent to exercise authority over the maritime belt in accordance with what is customary under the law of nations. Even if there were, it is elementary that acts of a legislature do not limit the power of future legislatures; and there is no reason why the legislature of 1924 should not exercise the power which under the law of nations and the decisions of the Supreme Court was unquestionably possessed by the state.

We come, then, to the second point made by plaintiffs, i. e., that the discrimination between residents and non residents in the amount of the license fee exacted is violative of the Privileges and Immunities clause of Article IV of the Constitution and the Equal Protection Clause of the Fourteenth Amendment. It is well settled, however, that these constitutional provisions do not require the state to accord equality of treatment to non residents and residents with respect to the taking of fish or animals ferae naturae, the ownership of which is in the state for the benefit of its inhabitants. Geer *v.* Connecticut, 161 U. S. 519; Ward *v.* Race Horse, 163 U. S. 504; Patsone *v.* Pennsylvania, 232 U. S. 138; Haavik *v.* Alaska Packers' Association, 263 U. S. 510; Locoste *v.* Department of Conservation, 263 U. S. 545; In re Eberle, 98 F. 295; Anderson *v.* Smith, 71 F. 2d 493; Commonwealth *v.* Hilton, 174 Mass. 30, 54 N. E. 362, 45 L. R. A. 475, 478. In the case last cited the rule applicable is stated by the Supreme Judicial Court of Massachusetts as follows:

> "It is now settled that the right of regulation and control of fisheries by the several states is the legislation that secures the benefits of the public right in property to its own inhabitants. The rights, immunities, and privileges which are secured by the Constitution of the United States to the inhabitants of the several states do not include, in favor of inhabitants of any state, rights in common property of the inhabitants of other states. McCready *v.* Virginia, 94 U. S. 319, 24 L. Ed.

248; Wharton *v.* Wise, 153 U. S. 155, 38 L. Ed. 669; Corfield *v.* Coryell, 4 Wash. C. C. 371; Blake *v.* McClung, 172 U. S. 239-249, 43 L. Ed. 432-436."

In the language of Mr. Justice Holmes in Patsome *v.* Pennsylvania, supra, "It is to be remembered that the subject of this whole discussion is wild game (shrimp), which the state may preserve for its own citizens as it pleases." The benefit to be derived from these shrimp, produced in the inland waters of the state and constituting a valuable source of food and income for large numbers of its people, will be largely lost if out of state fishing boats are allowed to prey upon them without let or hindrance. It is unquestionably within the power of the state, as a proper conservation measure, to require of out of state fishermen a license fee so high as to limit their number and to reimburse the people of the state in some measure for the loss sustained by them from the fishing of those who are licensed.

Plaintiffs rely upon Pavel *v.* Richard, 28 F. Supp. 992; but that case is not in point. What was there decided was the special case that a non resident land owner who used his property for raising fur bearing animals was denied the equal protection of the laws by a statute which imposed disproportionate license fees on non resident trappers with whom he had entered into contracts to trap on the property. The general rule that the state may exact higher license fees of non resident hunters and fishermen than of residents and may even exclude non residents from taking fish and game within the state was not considered and no indication was given of any intent to depart from it. If the case could be so interpreted, we should think it not well decided.

There is nothing in the importatipn or interstate commerce points. With the decision as to the power of the state over fishing in the maritime belt, the whole basis of the importation point goes out of the case. As to interstate commerce, the requirement that the shrimp destined for out of state shipment be stamped and properly packed is a proper regulatory provision. It is reasonable relation not only to maintaining the good reputation of produets originating in the State but also to insuring the collection of the one-eighth cent per pound tax, which in the absence of some

such requirement could be easily evaded on shrimp shipped out of the state. It is too well settled to admit of argument that a state may regulate the export of articles in which it has a special property, such as wild game or fish, even if interstate commerce be indirectly affected by the restriction. Geer *v.* Connecticut, supra; Rupert *v.* United States, 8 Cir. 181 F. 87; State *v.* Harrub, 95 Ala. 176, 15 L. R. A. 761, 36 Am. St. Rep. 195; McDonald *v.* Sou. Exp. Co., 134 F. 282; 22 Am. Jur. p. 697; note 32 A. L. R. 336 et *esq.*, and cases there cited. It is equally well settled that a tax on articles produced within a state will be sustained, even though they be intended for interstate shipment, where, as here, the tax does not discriminate against interstate commerce and interstate transportation has not commenced. Coe *v.* Errol, 116 U. S. 517; Heisler *v.* Thomas Colliery Co., 260 U. S. 245, 258; Hope Natural Gas Co. *v.* Hall, 274 U. S. 284; Ohio Oil Co. *v.* Conway, 281 U. S. 146; South Carolina Power Co. *v.* South Carolina Tax Commission, 52 F. 2d 515; s.c. 286 U. S. 525, 60 F. 2d 528; 288 U. S. 188. Since the tax on shrimp here involved was levied without discrimination against interstate commerce, it was valid; and the requirement for packing and stamping was valid as a proper means of preventing tax evasion. It was proper, also, because of the special property of the people of South Carolina in the shrimp taken within the state.

Argument is made that the tax and requirement for fishing and stamping are invalid because applicable to shrimp caught beyond as well as to those caught within the three mile limit. It would be entirely impractical, however, to differentiate between shrimp taken within and without the limit; and those who avail themselves of the privilege of fishing within the limit are properly required to report their entire catch, since otherwise the reasonable provisions of the statute would be unenforceable. See Mirkovich *v.* Milnor, 34 F. Supp. 409; Bayside Fish Flour Co. *v.* Gentry, 297 U. S. 422. In the case last cited, where complaint was made that a California statute applied to fish taken beyond the waters over which the state had jurisdiction, the Court said:

> "Sardines taken from waters within the jurisdiction of the state and those taken from without are, of course,

indistinguishable; and to the extent that the act deals with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy. Silz *v.* Hesterberg, 211 U. S. 31, 39-40."

Plaintiffs place great reliance upon Foster-Fountain Packing Co. *v.* Haydel, 278 U. S. 1, where the Supreme Court held invalid a state statute which forbade the exportation of shrimp from which head and hulls or shells had not been removed. No such unreasonable interference with interstate commerce is involved in the statute before us. That the case relied on has no application sufficiently appears from the analysis made of it in Bayside Fish Co. *v.* Gentry, supra, where the Court said:

"Appellant places great reliance upon Foster-Fountain Packing Co. *v.* Haydel, 278 U. S. 1. There an act of the State of Louisiana forbade exportation of shrimp from which the heads and hulls or shells had not been removed. The ostensible purpose of the act was to conserve the raw shells for local use. The bill and affidavits in support of it, however, demonstrated, we held, that this purpose was feigned, and that the real purpose was to prevent the shrimp from being moved as theretofore from Louisiana to a point in Mississippi, where they were packed or canned and sold in interstate commerce, and thus through commercial necessity to bring about the removal of the packing and canning industries from Mississippi to Louisiana. The Louisiana act authorized every part of the shrimp to be shipped and sold in interstate commerce. We held that the state might have retained the shrimp for use and consumption therein; but, having fully permitted shipment and sale outside the state, those taking the shrimp under the authority of the act became entitled to the rights of private ownership and the protection of the commerce clause. It is plain that the decision has no application to the case under review."

For the reasons stated, we think that the injunction applied for should be denied and that the case should be dismissed.

INJUNCTION DENIED AND CASE DISMISSED.

We concur in the foregoing opinion.

/s/ John J. Parker, U. S. Circuit Judge, Fourth Circuit. C. C. Wyche, U. S. District Judge for the Western District of South Carolina, sitting by designation in the Eastern District of South Carolina. George Bell Timmerman, U. S. District Judge for the Eastern and Western Districts of South Carolina.

A True Copy, Attest. Ernest L. Allen, Clerk of U. S. District Court, East. Dist. So. Carolina. (Seal)

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DEGRACIA, S. W. Davies, S. D. Collins, and The Atlantic Seafood Producers, Inc., a corporation, Plaintiffs,

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, C. L. Young and J. A. Wilcox, composing the South Carolina State Board of Fisheries, a body corporate, and Alonzo B. Seabrook, the Chief Inspector thereof, Defendants.

Findings of Fact and Conclusions of Law

The Court makes the following findings of fact:

1. The individual plaintiffs are citizens and residents of the State of Georgia and the corporate plaintiff is a corporation created and existing under the laws of the State of Florida. The defendants are citizens and residents of the State of South Carolina composing the Board of Fisheries of that state and charged by law with the enforcement of

the statutes of which plaintiffs complain in this suit. The claim of plaintiffs arises out of and is based upon the Constitution of the United States. The amount in controversy exceeds the sum and value of three thousand dollars.

2. Plaintiffs are engaged in fishing for shrimp within and without the three mile maritime belt of the ocean off the shores of the State of South Carolina and defendants are demanding of them that they pay an annual license fee of $2500.00 for each boat engaged in shrimp fishing within the maritime belt, as prescribed by Code sec. 3379 as amended, that they pay a tax of one-eighth of a cent a pound on all shrimp caught by boats fishing within the maritime belt, even though some of such shrimp may have been caught beyond the maritime belt, as provided as Code 3374, and that they bring all of such shrimp into port and properly pack and stamp them there before shipping them into other states, as provided by Code sec. 3414. Defendants threaten that, if plaintiffs fish for shrimp in the maritime belt without complying with these provisions of the Code, defendants will prosecute them under the penal provisions of the Code, which provide fine and imprisonment for violation of these statutory provisions, and plaintiffs will be unable to continue their business if these statutory penalties are invoked against them.

3. Plaintiffs contend that the provisions of the statutes above mentioned are void as applied to them for that (1) the State of South Carolina is without jurisdiction to exercise statutory authority over fishing within the three mile maritime belt as attempted by said statutes, (2) they are violative of the Privileges and Immunities clause of Article IV of the Constitution and the equal protection clause of the 14th Amendment, in that they discriminate between residents and non residents of the state, and (3) that they impose a burden on interstate commerce and a tax on imports in violation of the Commerce clause of the Constitution. They have submitted the case for final decree.

4. If the contentions of plaintiffs as to the invalidity of the statutes were valid, they would be irreparably damaged by their enforcement and have no adequate remedy at law, in that they would be forced by defendants to pay large

sums by way of taxes for which no means of recovery is provided by law, or to desist from fishing in the maritime belt off the coast of South Carolina, which would result in the loss of business for which no compensation is provided, the tax of the injury in case of some of the plaintiffs being well in excess of $3,000.00.

The Court states its conclusions of law as follows:

1. The statutes involved are not beyond the powers of the legislature to regulate fishing for shrimp in the three mile maritime belt off the shores of South Carolina, in the absence of any legislation by Congress with respect to the subject matter.

2. The Statutes do not violate the Privileges and Immunities clause of the Fourth Article of the Constitution or the Equal Protection clause of the Fourteenth Amendment.

3. The Statutes do not impose an import duty or burden interstate commerce in violation of sections 8 or 10 of Article I of the Constitution.

4. The plaintiffs are not entitled to the injunction prayed and their suit should be dismissed.

This the 12th day of September, 1947.

(S.) JOHN J. PARKER,
U. S. Circuit Judge, Fourth Circuit;

(S.) C. C. WYCHE,
U. S. District Judge for the Western District of South Carolina, sitting by designation in the Eastern district of South Carolina;

(S.) GEORGE BELL TIMMERMAN,
U. S. District Judge for the Eastern and Western Districts of South Carolina.

A true copy, attest.

ERNEST L. ALLEN,
Clerk of U. S. District Court
East. Dist. So. Carolina.

[SEAL.]

APPENDIX "C"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DEGRACIA, S. W. DAVIES, S. D. COLLINS, and THE ATLANTIC SEAFOOD PRODUCERS, INC., a corporation; *Plaintiffs*,

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, C. L. YOUNG and J. A. WILCOX, Composing the South Carolina State Board of Fisheries, a Body Corporate and ALONZO B. SEABROOK, the Chief Inspector thereof, *Defendants.*

Final Decree

This cause coming on to be heard by consent at Spartanburg, South Carolina, on application of plaintiffs for an interlocutory injunction to restrain defendants, officers of the State of South Carolina, from enforcing statutes of that state on the ground that they contravene provisions of the Constitution of the United States; and a court of three judges having been convened pursuant to section 266 of the Judicial Code; and evidence having been taken, and arguments of counsel heard and the cause having been submitted for final decree and the Court having made its findings of fact and conclusions of law which are filed herewith; and the Court being of opinion for the reasons set forth in the written opinion filed herewith, that the application for injunction should be denied and that the suit should be dismissed;

Now, therefore, it is ordered, adjudged and decreed that the application of plaintiffs for an injunction be and the

same is hereby denied, and that the suit be and it is hereby dismissed at the cost of plaintiffs.

This the 12th day of September 1947.

(S.) JOHN J. PARKER,
U. S. Circuit Judge, Fourth Circuit;

(S.) C. C. WYCHE,
U. S. District Judge for the Western District of S. C. sitting by designation in the Eastern District of S. C.;

(S.) GEORGE BELL TIMMERMAN,
U. S. District Judge for the Eastern and Western District of S. C.

A true copy, attest.

ERNEST L. ALLEN,
Clerk of U. S. District Court,
East. District So. Carolina

Service of the within Statement of Jurisdiction and exhibits accepted this the 4th day of October, 1947.

(S.) ROBINSON & ROBINSON,
Of Counsel for Defendants.